

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Vonage Holdings Corporation	)	WC Docket No. 03-211
	)	
Petition for Declaratory Ruling Concerning	)	
an Order of the Minnesota Public Utilities	)	
Commission	)	

**REPLY COMMENTS OF  
PACWEST TELECOM, INC., AND  
RCN CORPORATION**

PacWest Telecom, Inc. (“PacWest”) and RCN Corporation (“RCN” and together with PacWest collectively, “Joint Commenters”), by their undersigned attorneys, hereby file these reply comments in the above-referenced Docket.<sup>1</sup> On September 22, 2003, Vonage Holdings Corporation (“Vonage or Petitioner”) filed a petition seeking that the Federal Communications Commission (“Commission”) preempt the Minnesota Public Utilities Commission’s (“MN PUC”) September 11, 2003 order (the “MN PUC Order”), requiring Vonage to comply with state laws governing providers of telephone service.<sup>2</sup> In its Petition, Vonage argues that it is providing an information service not subject to telecommunications service regulation or common carrier regulation under Title II of the Communications Act of 1934.<sup>3</sup> Vonage also claims that (i) the MN PUC Order conflicts with federal laws and policies;<sup>4</sup> (ii) federal preemption is necessary because of the

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<sup>1</sup> See *Pleading Cycle Established for Comments on Vonage Petition for Declaratory Ruling*, WC Docket No. 03-211 (rel. Sept. 26, 2003).

<sup>2</sup> *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (filed September 22, 2003) (the “Vonage Petition”).

<sup>3</sup> See *Id.* at 12.

<sup>4</sup> See *Id.* at 17.

conflict between state and federal laws;<sup>5</sup> and (iii) preemption is necessary because of the impossibility of separating any service offered over the Internet into intrastate and interstate components.<sup>6</sup>

In the initial round of comments, more than 50 parties filed comments in three broad categories: (i) comments in support of the Vonage Petition; (ii) comments advocating a voice over Internet protocol (“VoIP”) rulemaking proceeding in place of, or prior to, a ruling on the Vonage Petition; and (iii) comments opposing the Vonage Petition.

Joint Commenters are competitive local exchange providers (“CLECs”) providing wholesale and retail telecommunications services to numerous customers across the country. Among Joint Commenters’ customers and potential customers are VoIP providers.

In response to some of the comments filed in this docket, Joint Commenters offer these reply comments and urge the Commission to grant the relief requested by Vonage, but at the same time request that the Commission examine other important issues associated with VoIP in separate rulemakings.

## **I. VONAGE SERVICES ARE INFORMATION SERVICES**

### **A. There is a clear difference between the information services transmitted through telecommunications networks and the networks on which they travel**

Joint Commenters support Vonage’s contention that its VoIP offering is an information service, and as such, should continue unregulated by the Commission.<sup>7</sup> Joint

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<sup>5</sup> See *id.* at 8.

<sup>6</sup> See *id.* at 27.

Commenters also agree with Vonage, and the comments filed by several participants in this proceeding, that Vonage's VoIP service is an information service which should not be subjected to unnecessary regulation by the Commission or state commissions, as was Congress' intention in the 1996 Act.<sup>8</sup>

As noted by MCI and Comptel, Commission policy and Congress' intent in the 1996 Act is clear—there is no need to regulate as common carriage those applications that are transmitted or “ride on” telecommunications networks, as long as such networks remain open to all applications.<sup>9</sup>

In a very recent decision, the Ninth Circuit recognized that certain services may have a “telecommunications” component and an “information service” component and as such, should be afforded different treatment.<sup>10</sup> While analyzing the Commission's *Cable Modem Order*<sup>11</sup>, the Court held that the cable modem service consists of two elements—a ‘pipeline’ (a regulated telecommunications service), and the Internet or deregulated service transported through the pipeline.<sup>12</sup>

Vonage's position that its service is an information service that *uses* telecommunications services as part of its offering was also adopted by the District Court for the District of Minnesota. In its decision, the District Court noted that: “[t]he Court concludes that Vonage's activities fit within the definition of information services. Vonage's services are closely tied to the provision of telecommunications services as

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<sup>7</sup> See *id.* at 12.

<sup>8</sup> See, e.g., Comments of Level 3 at 2, Comments of the High Tech Broadband Coalition at 2, Comments of 8x8, Inc. at 6, Joint Comments of MCI and Comptel at 10.

<sup>9</sup> See *id.* at 10.

<sup>10</sup> See *Brand X Internet Services v. Federal Communications Commission*, 2003 U.S. App. LEXIS 20306 (9<sup>th</sup> Cir. Oct. 6, 2003) (“*Brand X*”).

<sup>11</sup> See *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002).

<sup>12</sup> See *Brand X* at 22-25.

defined by Congress, the courts and the Commission, but this Court finds that Vonage *uses* telecommunications services, rather than provides them.”<sup>13</sup>

Joint Commenters urge the Commission to consider the Court’s analysis that the “content” part of complex services, such as Vonage’s VoIP offering, should be unregulated information services, regardless of whether such service uses telecommunications services for transport. Accordingly, the Commission should promptly grant Vonage’s petition and preempt state regulation of this information service.

**B. As An Information Service Provider, Vonage Is Entitled to Connect to the PSTN Via Local Services**

Under the Commission’s ESP exemption, information service providers are treated as end-users, not carriers. As such, they are entitled to purchase local services to connect to the Public Switched Telephone Network (“PSTN”). Through this exemption, interstate information services are originated from and delivered to the PSTN without being subject to access charges. This long-standing Commission policy has permitted the Internet to grow from a fledgling government network into the ubiquitous, accessible network that it is today.<sup>14</sup>

As an information service provider, Vonage, and other providers of VoIP services, are entitled to purchase local services to access the PSTN without paying access charges. Instead, information service providers are allowed to purchase regulated retail services from local carriers. Although CLECs are serving VoIP providers as customers,

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<sup>13</sup> *Vonage Holdings Corp. v. Minnesota Pub. Utils Comms’n*, 2003 WL 22567645 (D. Minn. Oct. 16, 2003) at 12 (emphasis in original).

<sup>14</sup> *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, (1998) at ¶¶ 2 and 73.

ILECs' refusal to recognize the information service status of VoIP creates great uncertainty for CLECs. Even though the Commission has taken a hands-off policy toward regulating VoIP, and even though the Commission has stated that VoIP is not currently subject to access charges,<sup>15</sup> ILECs persist in their efforts to impose access charges on VoIP providers, and sometimes even on the CLECs that serve them as customers. Granting Vonage's Petition would help to remove this uncertainty and reduce the risks currently associated with CLECs providing local services to VoIP providers.

**II. THE COMMISSION SHOULD ISSUE A TEMPORARY REGULATORY RULING CONFIRMING VOIP IS AN INFORMATION SERVICE UNTIL THE COMMISSION CONSIDERS VOIP SERVICES IN A MORE COMPREHENSIVE PROCEEDING**

In response to the comments submitted in this docket contending that the Commission should conduct a rulemaking proceeding in place of, or prior to, a ruling on the Vonage Petition,<sup>16</sup> Joint Commenters submit that until such time as the Commission conducts such proceeding, the Commission should grant the relief requested by Vonage and clarify the regulatory uncertainty surrounding VoIP. Thoroughly analyzing all aspects surrounding VoIP is a process that would likely take the Commission several months to complete, while failure to act in the instant case will leave Vonage and all other companies providing services to VoIP providers, such as Joint Commenters, subject to regulatory uncertainty, including varying degrees of regulation by numerous state commissions.

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<sup>15</sup> *Developing a Unified Inter-carrier Compensation Regime*, Notice of Proposed Rule Making, CC Docket No. 01-92 (rel. April 27, 2001) at ¶ 133.

<sup>16</sup> See, e.g., Comments of the Minnesota Attorney General at 5-7; Comments of the Communications Workers of America at 1-4; and Comments of SBC Communications at 2.

The Commission is currently considering other issues relating to VoIP in the context of the AT&T proceeding<sup>17</sup> and the pulver.com proceeding.<sup>18</sup> Moreover, Chairman Powell has stated publicly that the Commission is going to initiate a proceeding to examine in a more comprehensive manner the regulatory issues related to VoIP services.<sup>19</sup> The Commission has broad discretion under its rules to issue a declaratory ruling in order to “remove uncertainty” or to “terminate a controversy” with respect to a particular issue.<sup>20</sup> Consistent with this authority, until such time as the Commission conducts a thorough analysis of all regulatory aspects surrounding VoIP, Joint Commenters strongly urge the Commission to use this proceeding as an opportunity to remove any remaining uncertainty regarding the Commission’s current policy of treating VoIP services as an information service.

Joint Commenters agree that a definitive declaratory ruling on this important issue is warranted in the very near future given the distinct possibility of having 50 differing state opinions on the matter.<sup>21</sup> Until the Commission reviews all positions associated with these matters and takes final action, CLECs, such as Joint Commenters, are left “in the middle” of an uncertain regulatory scenario that acts as an barrier to effective competition and impedes CLECs’ ability to actively pursue VoIP providers as customers.

In a recent declaratory ruling involving other developing technology issues, the Commission recognized that the removal of important regulatory uncertainties likely will

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<sup>17</sup> *Wireline Competition Bureau Seeks Comment on AT&T’s Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, Public Notice, DA 02-3184 (rel. Nov. 18, 2002).

<sup>18</sup> *Pleading Established for Comments on pulver.com Petition for Declaratory Ruling*, WC Docket No. 03-45, Public Notice, DA 03-439 (rel. Feb. 14, 2003).

<sup>19</sup> FCC Chairman Michael K. Powell, Keynote Speech at the U.S. Telecom Association’s Annual Conference, Las Vegas, Nevada (October 14, 2003).

<sup>20</sup> 47 C.F.R. § 1.2.

<sup>21</sup> Comments of PaeTec Communications at 1-4.

have the effect of promoting investment, growth and innovation in burgeoning technology markets.<sup>22</sup> Likewise, in the context of VoIP services, a ruling by the Commission that removes any uncertainty as to the regulatory treatment of this service, albeit only until the Commission takes definitive action in a more comprehensive proceeding, could only serve to assist in the development of the VoIP market.

The Commission should act promptly on the issues in this proceeding and should not allow state commissions to take diverging views on this matter and subject VoIP providers, and consequently CLECs servicing such VoIP providers, to varying regulatory regimes.

Accordingly, Joint Commenters submit that the Commission should issue a declaratory ruling that not only grants Vonage the relief requested in its Petition, but until such time as the Commission completes its in-depth analysis of the regulatory treatment of VoIP, confirms the status of VoIP as an information service subject solely to the obligations of Title I of the Act.

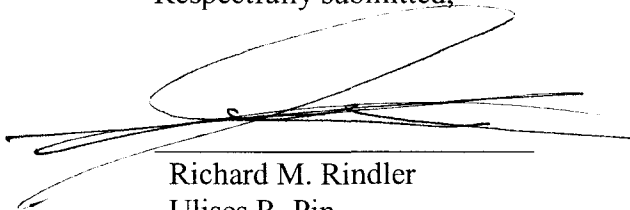
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<sup>22</sup> See, e.g., *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Internet Over Cable Declaratory Ruling, 17 FCC Rcd. 4798, ¶ 5 (2002); *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Further Notice of Proposed Rulemaking and Declaratory Ruling, 15 FCC Rcd. 18199, ¶ 14 (2000).

### III. CONCLUSION

For the foregoing reasons, Joint Commenters urge the Commission to grant Vonage's request for a declaratory ruling, but at the same time not delay resolution of other critical issues associated with VoIP that are and will soon be pending in other proceedings.

Respectfully submitted,



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## **CERTIFICATE OF SERVICE**

I, hereby certify that I have on this 24<sup>th</sup> day of November, 2003 served a true and correct copy of the foregoing document upon the following parties via U.S. Mail, first class, postage prepaid, properly addressed as follows:

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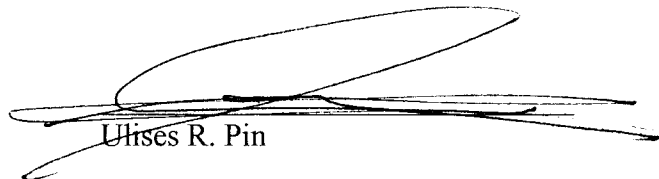
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